

IN THE COURT OF APPEALS  
STATE OF ARIZONA  
DIVISION TWO

FILED BY CLERK

OCT 16 2007

COURT OF APPEALS  
DIVISION TWO

THE STATE OF ARIZONA,

Respondent,

v.

WILLIAM ERIC STOKES,

Petitioner.

)  
)  
) 2 CA-CR 2007-0165-PR  
) DEPARTMENT B  
)

MEMORANDUM DECISION

) Not for Publication  
) Rule 111, Rules of  
) the Supreme Court  
)  
)  
)

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF PINAL COUNTY

Cause No. CR15700

Honorable Joseph R. Georgini, Judge

REVIEW GRANTED; RELIEF DENIED

Law Offices of Clay Hernandez, P.C.  
By Clay Hernandez

Tucson  
Attorney for Petitioner

E S P I N O S A, Judge.

¶1 Petitioner William Stokes was charged with first-degree murder, second-degree murder, and child abuse. The victim was his girlfriend's eighteen-month-old daughter. A jury found him guilty of second-degree murder of a child, and the trial court sentenced him to a life term of imprisonment. This court affirmed the conviction and sentence on appeal and denied relief on his consolidated petition for review of the denial of post-conviction relief, filed pursuant to Rule 32, Ariz. R. Crim. P. *State v. Stokes*, Nos. 2 CA-CR 91-0045, 2 CA-CR 92-0010-PR (consolidated) (memorandum decision filed June 23, 1992). Stokes

sought post-conviction relief in a subsequent proceeding, and again this court denied relief. *State v. Stokes*, No. 2 CA-CR 2003-0073-PR (decision order filed May 21, 2004). The supreme court denied review of our decisions in both previous cases. In this petition for review, Stokes challenges the trial court's order summarily dismissing his third petition for post-conviction relief after finding his claims precluded. Absent an abuse of the trial court's discretion to determine whether post-conviction relief is warranted, we will not disturb the trial court's rulings. *See State v. Schrock*, 149 Ariz. 433, 441, 719 P.2d 1049, 1057 (1986).

¶2 On appeal, Stokes raised numerous claims of trial error, including the allegedly improper admission of evidence, prosecutorial misconduct, the court's failure to remove five jurors for cause, and its refusal to give two of his requested jury instructions. He also appears to have raised claims of ineffective assistance of trial counsel. And in the consolidated petition for review, he claimed the trial court had erred by denying post-conviction relief on his claims of ineffective assistance of trial counsel. In his second post-conviction proceeding, Stokes claimed the indictment was multiplicitous; the trial court erred by instructing the jury on second-degree murder as though it were a lesser-included offense of first-degree, felony murder; principles of double jeopardy and collateral estoppel barred his second-degree murder conviction after the jury implicitly acquitted him of felony murder; and he should not have been tried on both felony murder and second-degree murder because of the illegal indictment. On review, this court found the trial court had correctly concluded the claims raised in the second post-conviction proceeding were precluded because they could have been raised in his first post-conviction petition.

¶3 In this third proceeding, Stokes raises claims of ineffective assistance of trial and appellate counsel. He contends his claims may not be deemed waived and thereby precluded, *see* Rule 32.2, because they are based on claims of such constitutional magnitude that they must be, and were not, personally waived by him. Relying on the supreme court’s decision in *Stewart v. Smith*, 202 Ariz. 446, 46 P.3d 1067 (2002), Stokes maintains on review, as he did below, that his claim is based on a violation of his right against double jeopardy that neither appellate nor trial counsel asserted. Stokes argues his double jeopardy rights were violated because the indictment charged him with “alternative theories of liability, and because jurors were instructed that the second charge was a lesser-included offense when it was not . . . .” Although the state did not file a response to the Rule 32 petition, the trial court dismissed it, finding “all matters . . . are precluded as having been previously ruled upon or untimely filed or the Petition lacks sufficient basis in law and fact to warrant further proceedings here . . . .”

¶4 Stokes previously raised claims of ineffective assistance of counsel in both his first and second petitions. He suggests the trial court and this court incorrectly found he was precluded in the second post-conviction proceeding from raising claims of ineffective assistance of appellate and trial counsel because his first petition for review was consolidated with his direct appeal. He seems to argue in this proceeding that applying Rule 32.2 to preclude his double jeopardy claim violated due process. But the correct means to challenge this court’s denial of relief in the second post-conviction proceeding was not by filing a third petition for post-conviction relief but by petitioning the supreme court for review. As

previously stated, Stokes did file a petition for review of this court's decision order, but the supreme court denied it.

¶5 Additionally, we are unable to determine from the record before us precisely what claims of ineffective assistance of trial counsel Stokes raised in his first post-conviction proceeding, although we believe we can discern the substance of those raised on appeal. However, because he did raise some claims of ineffective assistance of trial counsel, based on *Smith* and this court's decision in *State v. Swoopes*, No. 2 CA-CR 2006-0174-PR, ¶¶ 16, 21, 22, 24-25, 2007 WL 2714093 (Ariz. Ct. App. Sept. 19, 2007), his subsequent claims of ineffective assistance of trial counsel are precluded. We agree with Stokes that he could not have claimed ineffective assistance of appellate counsel in the first post-conviction proceeding, given that his direct appeal was consolidated with the first petition for review. *See id.* ¶ 24. It also appears that counsel on appeal and in the first post-conviction proceeding were the same person.

¶6 Nevertheless, even if it were appropriate for us to consider such a claim in this, his third post-conviction proceeding, Stokes has failed to establish that (1) the underlying double jeopardy claim was not one of the bases for his first claim of ineffective assistance of trial counsel and, therefore, already adjudicated and precluded under Rule 32.2(a)(2), or (2) that the underlying claim is, in fact, a claim of sufficient constitutional magnitude to require a knowing, personal waiver. And to the extent Stokes is suggesting that fundamental error occurred and that fundamental error cannot be precluded, we rejected that argument in *Swoopes*. *Id.* ¶ 41. As we stated there, “[n]ot all error that is fundamental involves the violation of a constitutional right that can be waived only if the defendant personally does

so knowingly, voluntarily, and intelligently.” *Id.*; *see also State v. Espinosa*, 200 Ariz. 503, ¶ 8, 29 P.3d 278, 280 (App. 2001) (claim of sufficient constitutional magnitude is ““an inherently personal right of fundamental importance” [such] that it must be personally and expressly waived”), *quoting State v. Smith*, 197 Ariz. 333, ¶ 13, 4 P.3d 388, 393 (App. 1999), *quoting Winters v. Cook*, 389 F.2d 174, 178 (5th Cir. 1973).

¶7 Accordingly, although we grant Stokes’s petition for review, we deny relief.

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PHILIP G. ESPINOSA, Judge

CONCURRING:

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PETER J. ECKERSTROM, Presiding Judge

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JOSEPH W. HOWARD, Judge